EXERCISE OF THE POLICE POWER FOR AESTHETIC PURPOSES.

The proper limitation to place upon the police power is a question that still puzzles the courts. In two recent cases, *Ingham v. Brooks* (1920, Conn.) 111 Atl. 209, and *Lincoln Trust Co. v. Williams Bldg. Corp.* (1920) 229 N. Y. 313, 128 N. E. 209, courts took different views regarding building restrictions. In the Connecticut case a borough ordinance forbidding the erection of any building unless a written permit was issued by the warden and burgesses was held unreasonable. In the New York case the court declared constitutional a statute amending the charter of New York City, which empowered the board of estimate to pass resolutions creating building zones.

The police power is designed to promote the public welfare by restraints and compulsion.[1] When rights in private property are invaded, the courts have held that the basis of the proper exercise of this power must be to promote the public health, safety, morals, or general welfare.[2] The police power contemplates the destruction of the particular right or privilege legislated against, while under the power of eminent domain that right is transferred to the public use;[3] that is, the rights are extinguished in the individual and re-created in the public. When a particular right, or more accurately privilege, cannot be enjoyed by an individual without injury to the public, it is most certain that its transfer to a public use cannot change its harmful character. And hence the prohibition of the use is an exercise of the police power, and not a taking under the power of eminent domain. The abatement of a nuisance is an obvious example. The distinction seems a fine one to draw, but it exists.[4] Can it be said that the establishment of a building line results in the taking of private property for a public use? The privilege of building upon the land between the line and the street has ceased to exist; the public cannot build there without defeating the very purpose that could give legality to the act establishing the line.[5] Such

[1] Freund, *Police Power* (1904) sec. 3; Tiedeman, *Limitations on Police Power* (1886) sec. 1.

[2] *Eubank v. City of Richmond* (1912) 226 U. S. 137, 33 Sup. Ct. 76.

[3] Freund, *Police Power* (1904) secs. 511, 512; 1 Nichols, *Eminent Domain* (1917) sec. 54.

[4] See 1 Lewis, *Eminent Domain* (3d ed. 1909) sec. 1. This author defines the power of eminent domain as "the power to take private property for the public welfare." See NOTES (1920) 20 COL. L. REV. 591, 592.

[5] Such a taking would fall under Mr. Lewis's definition as a taking for the public welfare. But is this taking really an exercise of the power of eminent domain? For the rights and privileges taken cease to exist and are not transferred to the public. In *St. Louis v. Hill* (1893) 116 Mo. 527, 22 S. W. 861 the court held that the establishment of a building line constituted a "taking" of the property without compensation. Taking, when used in the sense of a taking under the power of eminent domain, connotes the transfer of some privileges in the land to the public.

a distinction seems sound and necessary in order to understand the decisions, for it is under one of these powers that the ordinances in the principal cases must be sustained.

The police power can be properly exercised only in a reasonable manner, without improper discriminations, and without denying due process of law. When municipal corporations have attempted its exercise for apparently "aesthetic" purposes, the courts have refused to recognize their acts as valid.[6] Ordinances restricting such buildings as livery stables,[7] garages,[8] laundries,[9] junk-shops,[10] brick-yards,[11] undertaking establishments,[12] and storage-warehouses[13] have furnished abundant litigation. Courts generally refuse to recognize the validity of building lines for aesthetic purposes.[14] In those cases where the ordinances have been upheld the courts have often gone a long way to find some threatened injury to public health, safety or morals. Some jurisdictions have sustained such ordinances under the power of eminent domain and have provided compensation.[15] Connecticut has made like provision in the establishment of building lines.[16] Such legislation seems based

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[6] *Quintini v. Aldermen* (1889) 64 Miss. 483, 1 So. 625 (ordinance requiring a permit to build in a certain area held invalid).

[7] *Curtis v. Los Angeles* (1916) 172 Calif. 230, 156 Pac. 462 (invalid); *Little Rock v. Reinman-Wolfort* (1913) 107 Ark. 174, 155 S. W. 105 (valid).

[8] *Keller v. Oak Park* (1914) 266 Ill. 365, 107 N. E. 636 (invalid); *Smith v. Horsford* (1920, Kans.) 187 Pac. 685 (invalid); *Myers v. Fortunato* (1920, Del.) 110 Atl. 847 (valid). As to whether a garage is a nuisance *per se* see L. R. A. 1917 E, 369. Some courts consider this and others disregard it as a distinction.

[9] *Ex parte Quong Wo* (1911) 161 Calif. 220, 118 Pac. 714 (valid); *Waldren v. First Presbyterian Church* (1919, Okla.) 184 Pac. 106 (valid).

[10] *Weadock v. Detroit* (1909) 156 Mich. 376, 120 N. W. 991 (invalid); *Smolenski v. Chicago* (1917) 282 Ill. 131, 118 N. E. 410 (valid).

[11] *Denver v. Rogers* (1909) 46 Colo. 479, 104 Pac. 1042 (invalid); *Ex parte Hadacheck* (1913) 165 Calif. 416, 132 Pac. 584 (valid).

[12] *St. Paul v. Kessler* (1920, Minn.) 178 N. W. 171 (valid).

[13] *Ohio Hair Product Co. v. Rendigs* (1918) 98 Oh. St. 251, 120 N. E. 836 (valid).

[14] *Farist Steel Co. v. Bridgeport* (1891) 60 Conn. 278, 22 Atl. 561; *Eubank v. City of Richmond, supra* note 2; *St. Louis v. Hill, supra* note 5; *Welch v. Swasey* (1906) 193 Mass. 364, 79 N. E. 262, sustained in 214 U. S. 91, 29 Sup. Ct. 567.

[15] Gen. St. Minn., Supp. 1917, secs. 1639-10 to 1639-16. See *State v. Houghton* (1916) 134 Minn. 226, 158 N. W. 1017; see COMMENTS (1916) 26 YALE LAW JOURNAL, 151; *State ex rel. Twin City Building Co. v. Houghton* (1920, Minn.) 176 N. W. 159; NOTES (1920) 20 COL. L. REV. 591; COMMENTS (1920) 18 MICH. L. REV. 523.

[16] Conn. Rev. St. 1918, secs. 391-396. The constitutionality of this statute has not yet been determined. Similar provisions in city charters have been considered; but the cases seem uniformly to have held the lines invalid for defective procedure in establishing them, and the constitutional question has been avoided. See *Northrup v. Waterbury* (1908) 81 Conn. 305, 70 Atl. 1024; *Hartford v. Poindexter* (1911) 84 Conn. 121, 79 Atl. 79; *Benedict v. Pettes* (1912) 85 Conn. 537, 84 Atl. 332.

upon the idea that if compensation is provided, all the difficulties are avoided. But where there is a taking under the power of eminent domain it must be for a "public use," and there is as much difficulty in defining this term as the term "public welfare."[17]

Bearing in mind the distinction between the power of eminent domain and the police power, it is submitted that regulations which have a tendency or are designed to affect the aesthetic are more properly sustained under the police power. Several states have passed legislation providing for the establishment of districts or "zones" in the larger cities.[18] Massachusetts has made it a matter of constitutional amendment.[19] There is similar legislation in other states directed specifically against outside advertising.[20] Such legislation has generally been upheld, the courts basing their decisions upon the promotion of the public welfare. In the case of *St. Louis Advertising Co. v. City of St. Louis*,[21] Mr. Justice Holmes, in upholding an ordinance regulating bill-boards, said, "it is true. . . . that the plaintiff has done away with dangers from fire and wind, but apart from the question whether those dangers do not remain sufficient to satisfy the general rule, they are or may be the least of the objections adverted to in the cases." There is an intimation that there are other things in mind than the public health, safety, or morals. The present tendency is to broaden the scope of the police power and to use it to accomplish aesthetic purposes wherever in sound public policy there is reason to do so.

The apparently opposed decisions in the two principal cases may possibly be reconciled. In the Connecticut case, the court declared that the ordinance was unreasonable, because it gave discretionary powers to the officer who acted under it, and made no uniform rule for

[17] *Bunyan v. Palisade Park Commissioners* (1915) 167 App. Div. 457, 153 N. Y. Supp. 622; *Parker v. Williams* (1902) 188 U. S. 491, 23 Sup. Ct. 440; *Farist Steel Co. v. Bridgeport, supra* note 14.

[18] Calif. Laws of 1917, ch. 734, p. 1419. *See Ex parte Quong Wo, supra* note 9; *In re Montgomery* (1912) 163 Calif. 457, 125 Pac. 1070; *Ex parte Hadacheck, supra* note 11; Ill. Laws of 1919 ch. 54, p. 262; 2 Wolff's St. of La. (1920) 1355; Minn. Laws of 1915 ch. 128, sustained in *State ex rel. Twin City Building Co. v. Houghton, supra* note 15; Neb. Laws of 1919, ch. 185, p. 417; N. J. Laws of 1917 ch. 54, p. 94; N. Y. Laws of 1916, ch. 497, p. 1320, sustained in *Lincoln Trust Co. v. Williams Bdg. Corp.*, one of the instant cases.

[19] Const. of Mass. 60th Amendment (1918).

[20] The Supreme Court of the United States has passed upon bill-board restrictions in *Cusack v. City of Chicago* (1917) 242 U. S. 526, 37 Sup. Ct. 190, holding them constitutional. The following states have legislated upon advertising: Conn. Rev. St. 1918, secs. 3024-3030, held constitutional in *State v. Murphy* (1916) 90 Conn. 662, 98 Atl. 343; R. I. Laws of 1910, ch. 542, held constitutional in *Gilmartin v. Standish* (1917) 40 R. I. 219, 100 Atl. 394; Mass. Laws of 1903, ch. 158, p. 121, held unconstitutional in *Commonwealth v. Boston Advertising Co.* (1905) 188 Mass. 348, 74 N. E. 601; Comp. St. of N. J. 1910, sec. 152, p. 1791, held unconstitutional in *State v. Lamb* (1916, N. J.) 98 Atl. 459.

[21] (1919) 249 U. S. 269, 274, 39 Sup. Ct. 274.

his guidance. Under the New York law, the board of estimate was likewise given full discretionary powers. Perhaps the public welfare requires this discretionary power under the conditions existing in a New York City block, but not with respect to a lone fishing shack on the Connecticut shore. Even so, the two cases represent opposing views on discretionary powers.

Since the above comment went to press, the decision of the Connecticut Supreme Court of Errors in the case of *Town of Windsor v. Whitney et al.* (1920) 111 Atl. 354, has been published. In this case the constitutionality of Rev. St. 1918, secs. 391-395, which provide for the establishment of building lines by a commission on town plans (see note 16 *supra*) was upheld. Justice Wheeler, writing the majority opinion, sustains the establishment of building lines as a valid exercise of the police power. His reasoning proceeds upon the basis that all private property is held subject to regulations that will promote the public welfare and that such regulations do not result in a taking of private property which requires the exercise of the power of eminent domain and the payment of compensation. It seems hardly necessary to state that the writer is heartily in accord with these views. The case is an interesting and proper development of the legal principles involved.

LEGAL PRIVILEGE TO EMPLOY A RUNAWAY SERVANT

It is well settled that the enticement of a servant to commit a breach of his service contract is a tort giving the master a right to damages.[1] The same rule has been laid down in the case of an inducement to commit a breach of a contract, other than that of master and servant, but as to this there is some conflict.[2] There was a long line of cases holding further that it was a tortious act to harbor and employ the runaway servant of another with knowledge of the facts, even in the absence of enticement.[3] In the case of adult servants, however, most of these decisions may be regarded as resting on the Statute of Laborers,[4] a statute passed over 500 years ago in a time of great shortage of labor,

[1] *Lumley v. Gye* (1853, Q. B.) 2 E. & B. 216; see 7 Labatt, *Master and Servant* (1913) ch. 113.

[2] *Jones v. Stanley* (1877) 76 N. C. 355. Cf. *Bourlier Bros. v. Macauley* (1891) 91 Ky. 135, 15 S. W. 60.

[3] *Blake v. Lanyon* (1795, K. B.) 6 T. R. 221; *De Francesco v. Barnum* (1890, Ch.) 63 L. T. 514 (where the rule was held to apply to the employment contract of a ballet girl; and Fry, L. J., said that the repeal of the Statute of Laborers made no difference, in spite of the "very weighty argument of Coleridge, J., in *Lumley v. Gye*"), *Wilkins & Bros. v. Weaver* [1915] 2 Ch. 322. And see 1 Ames & Smith, *Cases on Torts*, 633, note.

[4] (1349) 23 Edw. III, c. 2.